

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

United States of America,
Plaintiff,
v.
Phillip Smith, et al.,
Defendants.

Case No. 2:11-cr-58-JAD-CWH

**Order re: Motion in Limine
[Doc. 133]**

A series of armed robberies occurred in Las Vegas, Nevada, between January 18, 2010, and May 15, 2010, at local businesses; collectively, these were known as the “Bandana” robberies due to the attire the robbers used to hide their identities. Defendants Phillip Smith and Develle Rural Merritte are charged with committing these crimes. A Grand Jury returned a twelve-count indictment against Smith and Merritte on February 15, 2011, and the government filed a Superseding Indictment on May 1, 2012. In the Superseding Indictment, both men are charged with one count of Conspiracy to Interfere with Commerce by Armed Robbery, 18 U.S.C. § 1951 (Count 1); thirteen counts of Use of a Firearm During and in Relation to a Crime of Violence, 18 U.S.C. § 924(c)(1)-(2) (Counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26); and twelve counts of Interference with Commerce by Robbery, 18 U.S.C. §§ 1951-52 (Counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25).

On May 29, 2014, Defendant Smith moved *in limine* to exclude certain evidence from presentation at trial: (1) his March 2, 2011, state court testimony; (2) evidence that numerous queries regarding Smith's 1994 Honda Accord were made in a national crime database; (3) Smith's 2007 misdemeanor citation for possession of marijuana; (4) statements from San Diego law enforcement regarding similar robberies in that area; (5) any mention of gangs; (6) a video that includes scenes from the high-speed pursuit of Smith and interviews with detectives and a victim; and (7) co-Defendant Merritte's statement of apology during his

1 sentencing and “any other statement implicating Mr. Smith.” Doc. 133 at 3-4.¹ I grant as
2 unopposed the request to exclude San Diego law enforcement statements regarding similar
3 crimes, deny the requests to exclude Smith’s 2007 misdemeanor citation, the video, and co-
4 defendant Merritte’s statements because the government has represented it does not intend to
5 introduce these evidentiary items in its case in chief, and I deny all remaining exclusion
6 requests without prejudice to their reassertion at trial when I have greater context to allow me
7 to better assess them.

Discussion

9 Although the Federal Rules of Evidence do not explicitly authorize motions in limine,
10 the trial courts' general authority to manage trials permits trial judges to rule on evidentiary
11 issues before the start of trial.² Pretrial consideration of evidentiary issues serves to avoid the
12 futile attempt of "unring[ing] the bell" when jurors have seen or heard inadmissible evidence,
13 even when stricken from the record.³ Motions in limine may also save expensive trial time
14 because ruling on evidentiary disputes in advance minimizes side-bar conferences and other
15 disruptions at trial, and potentially obviates the need to call certain witnesses.⁴

16 These policy considerations must be weighed against the loss of the court's ability to
17 consider evidence in the context of the trial when the court is "better situated . . . to assess the
18 value and utility of evidence."⁵ Limine rulings are provisional; they are "not binding on the
19 trial judge [who] may always change [her] mind during the course of a trial."⁶ "Denial of a

¹ The government responded, Doc. 137, and Smith has filed a reply. Doc. 140. Although Smith admits that this motion in limine is filed untimely, Doc. 133 at 6-8, the government has not specifically objected to the timing of the motion; in the interests of justice, I elect to reach the motions's merits.

²² See *Luce v. United States*, 469 U.S. 38, 40 n. 2 (1984).

³ *Brodit v. Cambra*, 350 F.3d 985, 1004-05 (9th Cir. 2003) (quotations and citations omitted).

⁴ See *United States v. Tokash*, 282 F.3d 962, 968 (7th Cir. 2002).

⁵ *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216, 1218 (D. Kan. 2007); *accord Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975) (“A better practice is to deal with questions of admissibility of evidence as they arise.”).

⁶ *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000); accord *Luce*, 469 U.S. at 41 (noting that in limine rulings are always subject to change, especially if the evidence unfolds in an unanticipated manner).

1 motion in limine does not necessarily mean that all evidence contemplated by the motion will
 2 be admitted to trial. Denial merely means that without the context of trial, the court is unable
 3 to determine whether the evidence in question should be excluded.”⁷ With these principles in
 4 mind, I address Smith’s exclusion requests in turn.

5 **1. Smith’s state court testimony**

6 Smith was convicted in Nevada state court for a pair of home invasions that took place
 7 around the time of the bandana robberies. He moves to preclude the government from
 8 introducing testimony Smith provided during Smith’s state-court proceedings, arguing that it
 9 is prejudicial because “the Jury will most likely view Mr. Smith’s failure to accept
 10 responsibility in his State case negatively, and be quick to convict him in this case for
 11 asserting his right to trial.” Doc. 133 at 11. Smith also contends that, because the court has
 12 already deemed his state-court conviction admissible, any such testimony is cumulative. *Id.*

13 The government argues that Smith’s testimony was voluntary and is inadmissible.
 14 Doc. 137 at 2. The government also notes that “Smith admitted certain facts related to the
 15 charges in this case,” *id.* at 3, and it contends that, given Smith’s blanket request that all trial
 16 testimony be precluded, it is difficult to know in advance what testimony will or will not be
 17 relevant. *Id.* I agree; at this time it is difficult, if not impossible, to determine whether
 18 Smith’s state-court testimony will become relevant and otherwise admissible. Accordingly,
 19 any ruling in this regard would be premature. I therefore deny this motion without prejudice
 20 to its reassertion closer to or at trial when the parties can more clearly articulate their
 21 positions on the admissibility of this testimony.

22 **2. Queries regarding the Honda Accord**

23 During its investigation, Metro detectives noted that there had been several queries in
 24 the National Crime Information Computer regarding the Honda Accord Smith was driving at
 25 the time of his arrest. Doc. 133 at 3; 133-1 at 14. Smith seeks to exclude evidence of these
 26 queries, arguing that they do not prove any material fact and that they relate, if at all, to

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 28 ⁷ *Tracey v. Am. Family Mut. Ins. Co.*, 2010 WL 3724896, at *2 (D. Nev. Sept. 17, 2010) (quoting *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004)).

1 “prejudicial inadmissible bad acts that tend to only prove that similar crimes were maybe
 2 committed in a completely different State, and therefore, Mr. Smith’s propensity to commit
 3 crimes in this case.” Doc. 133 at 11.

4 The government responds that this evidence is relevant because it helps explain how
 5 law enforcement linked this particular vehicle to Smith, and “two of the NCIC inquiries place
 6 the Honda Accord in Las Vegas, not California, on the dates that two of the robberies
 7 occurred, and one of the queries was done a half an hour from the time one of the robberies
 8 happened.” *Id.*

9 The documents submitted by Smith to support his exclusion argument do not describe
 10 why the license plate was queried several times and simply do not provide this court
 11 sufficient context to conclude that this evidence should be excluded. Accordingly, I deny the
 12 motion without prejudice to its reassertion at or near trial when the parties can better
 13 articulate their positions on this evidence.

14 **3. Smith’s 2007 misdemeanor citation**

15 Smith seeks to preclude introduction of a 2007 misdemeanor citation for possession of
 16 marijuana. The government represents it will not seek to introduce this evidence. Doc. 137
 17 at 4. As there is no dispute for the court to resolve in this regard, I will hold the government
 18 to its representation, and I deny the motion as moot.

19 **4. Statements given by San Diego law enforcement to Metro regarding
 20 similar robberies in that area**

21 Smith next asks me to exclude documents from California law enforcement
 22 investigations, numbered Bates pages 000018 to 000019, which are mentioned in Metro’s
 23 June 14, 2010, “Continuation Report,” on grounds that they are prejudicial and confuse the
 24 jury. Doc. 133 at 12. The government offers no response to this request. Under Nevada
 25 Local Criminal Rule 47-9, “The failure of an opposing party to file points and authorities in
 26 response to any motion shall constitute a consent to the granting of the motion.”⁸ The

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 28 ⁸ Nev. Loc. Crim. R. 47-9.

1 government's silence on this issue constitutes consent to granting Smith's request.
 2 Accordingly, this request is granted; the documents Bates stamped 18-19 will be excluded
 3 from trial.

4 **5. Reference to gang membership**

5 Next, Smith seeks a blanket exclusion of any reference to gangs or gang involvement,
 6 arguing that "the only purpose for allowing law enforcement to tell the Jury about its
 7 speculative suspicion of gang involvement is to [incite] the Jury into convicting Mr. Smith,
 8 because he is allegedly in a gang." Doc. 133 at 13. Smith points to a 9-1-1 audio recording
 9 of a February 26, 2010, Arby's robbery, in which gang affiliation was claimed. *Id.* at 2, 13.
 10 In its response, the government notes that the Arby's robbery was not the only time
 11 defendants claimed gang membership; during an alleged April 27, 2010, robbery of a Game
 12 Stop store, "one of the defendants" stated that he was a "Westside Blood" who had "already
 13 done 10 years for this before." Doc. 137 at 5.⁹ The government claims that all relevant
 14 evidence is inherently prejudicial and, in this case, the prejudice is not substantial when
 15 juxtaposed with other alleged statements of the defendants during the robberies in question,
 16 such as "Don't get up or I will shoot you," and "I'll put a hole in you if you set off the
 17 alarm." Doc. 137 at 5. It argues that "this is not a situation where the Government intends to
 18 argue gang membership equals criminal disposition." *Id.* Rather, it anticipates that the
 19 victims will testify that "the defendants themselves referred to gang membership during their
 20 commission of the charged crimes." *Id.*

21 Gang affiliation evidence, without more, is commonly barred because under Rule
 22 404(b) it constitutes impermissible "[e]vidence of other crimes, wrongs or acts [introduced]
 23 to prove the character of a person in order to show action in conformity therewith."¹⁰
 24 However, where evidence of gang membership is directly related to the events in question, it
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27 ⁹ The "Westside Bloods" are a known Las Vegas street gang. *Id.* at 137 n.2.
 28 ¹⁰ Fed. R. Evid. 404(b).

1 does not constitute “other crimes” evidence barred by Rule 404(b).¹¹ Instead, “evidence of
 2 gang affiliation is admissible when it is relevant to a material issue in the case.”¹² The
 3 prejudicial nature of such evidence can also be mitigated by a proper limiting instruction.¹³

4 It is not clear from the papers what evidence, exactly, the government intends to
 5 introduce at trial, making it difficult for me to reasonably assess its relevance and any
 6 prejudice. Accordingly, I deny the motion to exclude such references without prejudice to its
 7 reassertion closer to or at trial when the request can be better evaluated in the context of the
 8 anticipated evidence.

9 **6. The high-speed-chase video**

10 Smith also seeks to prevent the government from introducing “a Langley Productions
 11 Video titled Robbery/Bandana Case” that “contains a series of scenes involving the high-
 12 speed pursuit in the 2004 Honda Accord, scenes involving an interview” with Merritte,
 13 “interviews with investigating detectives,” and “an interview with the victim of the home
 14 invasion.” Defendant notes that it is “unclear who is filming the video and the purpose of the
 15 video.” Doc. 133 at 4. The government represents that it does not intend to introduce
 16 excerpts from the video, but reserves the right to request introduction of “stills or portions of
 17 the video at trial if either of the defendants opens the door.” Doc. 137 at 6. As the
 18 government has disavowed any intention to introduce the video itself, it does not appear that
 19 there is a dispute over this evidentiary item for the court to resolve. The request to exclude
 20 this evidence is thus denied as moot and without prejudice to its reassertion in the event the
 21 government seeks to introduce the video at trial.

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¹¹ *United States v. Santiago*, 46 F.3d 885, 888 (9th Cir. 1995).

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¹² *United States v. Easter*, 66 F.3d 1018, 1021 (9th Cir. 1995).

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¹³ *United States v. Rodriguez*, 754 F.3d 1122, 1138-39 (9th Cir. 2014); *Takahashi*, 205 F.3d at 1165.

7. Co-defendant Merritte's state-court apology and other statements implicating Smith

Finally, Smith seeks to exclude his co-defendant, Merritte's apology during his state court sentencing and any other statement in which Merritte implicates Smith. The government represents that it will not seek to introduce these statements in its case in chief. Doc. 137 at 6. Accordingly, because there is no dispute over these evidentiary items, this request is denied as moot and without prejudice to its reassertion if the government seeks to introduce these statements in its case in chief.

Conclusion

10 Accordingly, for the reasons stated above, IT IS HEREBY ORDERED that Smith's
11 Motion in Limine [Doc. 133] is GRANTED in part and DENIED in part:

- 12 • The unopposed request to exclude documents bates-stamped 18-19 is **granted**;

13 • The requests to exclude Smith's 2007 misdemeanor citation, the video, and co-

14 defendant Merritte's statements are **denied as moot** because the government has

15 represented it does not intend to introduce these evidentiary items; and

16 • The requests to exclude Smith's state-court testimony, queries in the National Crime

17 Information Computer regarding the Honda Accord, and gang references are **denied**

18 **without prejudice** to their reassertion at trial when the court has greater context to

19 allow it to better assess these requests.

20 DATED: November 12, 2014.

JENNIFER A. DORSEY
UNITED STATES DISTRICT JUDGE